United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS

For the Second Circuit

BISWANATH HALDER

Plaintiff-Appellant,

- against -

AVIS RENT-A-CAR SYSTEM, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF IN BEHALF OF DEFENDANT-APPELLEE
AVIS RENT-A-CAR SYSTEM, INC.

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Questions Presented	3
Statement of Case	4
A. Factual Background	4
B. Prior Proceedings	5
Summary of Argument	9
POINT I - The denials of plaintiff's subsequent motions to amend his complaint were correct	10
POINT II - The denials of plaintiff's motions to compel discovery were correct and, if error, were harmless error in view of the fact that the court below deemed that plaintiff had proven a prima facie case	16
POINT III - The nominal attorney's fee awarded was under the facts of this case a proper exercise of discretion by the trial court	19
POINT IV - The dismissal of the complaint on the merits is fully supported by the evidence	21
POINT V - The complaint should have been dismissed because the action was not timely within the limits of 42 USC §2000e-5(e) and (f)(1)	25
Conclusion	29

TABLE OF CASES

Page

Abiodun v. Martin Oil Service, Inc.,
475 F.2d 142 15

Ar[illegible]leta v. Duffy's, Inc., 471 F.2d 33 27

Burns v. Thiokol Chemical Corporation,
483 F.2d 300 16,18

Campbell v. A. C. Petersen Farms, Incorporated,
69 F.R.D. 457 15

Carrion v. Yeshiva University, 535 F.2d 722 . . 20

DaSilva v. Moore-McCormick Lines, Inc.,
47 F.R.D. 364 17

DeMatteis v. Eastman Kodak Company,
511 F.2d 306 mod. 520 F.2d 409 28,29

Espinoza v. Farah Mfg. Co., 414 US 86,
38 L Ed 2d 287, 94 S Ct 334 14

Evans v. Sheraton Park Hotel, 503 F.2d 177 . . 21

Fischler & Porter Co. v. Sheffield Corp.,
31 F.R.D. 534 17

Gradillas v. Hughes Aircraft Co.,
407 F.Supp. 865. 11

Halder v. Avis Rent-a-Car System, Inc.,
541 F.2d 130 (Docket #76-7039) 7

Langnes v. Green, 282 US 531, 75 L Ed 520
51 S Ct 243. 24

Lee v. Chesapeake & Ohio RR Co., 389 F.Supp. 84 20

Page

Matyi v. Beer Bottlers Union,
392 F.Supp. 60 20

McDonnell-Douglas v. Green, 411 US 792,
36 L Ed 2d 668, 93 S Ct 1817 21

Molybdenum Corp. of America v. EEOC,
457 F.2d 935 13

Morrow v. Crosby 418 F.Supp. 933 24

Newman v. Piggie Park Enterprises, Inc.,
390 US 400, 19 L Ed 2d 1263, 88 S Ct 964 . . 20

Olson v. Rembrandt Printing Co.,
511 F.2d 1220 13,26,27

Smith v. Perkin-Elmer Corporation,
373 F. Supp. 930 28,29

Williams v. General Foods Corp.,
492 F.2d 399 26

Willis v. Chicago Extruded Metals Company,
375 F.Supp. 362 14,26

STATUTES INVOLVED

42 USC §1981. 6,10,11

42 USC §2000e et.seq. 4,8

§2000e-5(c) and (d). 5

§2000e-5(e). 9,13,14,25

§2000e-5(f). 9,25,27

§2000e-5(k). 19

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BRIEF IN BEHALF OF DEFENDANT-APPELLEE AVIS RENT-A-CAR SYSTEM, INC.

Preliminary Statement

Plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, C.J.) entered September 15, 1976

dismissing the complaint with costs after a non-jury trial and awarding attorneys' fees in the amount of $500.00.

From plaintiff's statement of issues presented, it appears that he also appeals from the denial of his subsequent motions to amend his complaint and to compel disclosure. He also questions whether the complaint can be dismissed for lack of prosecution which is not relevant here since the dismissal occurred after a trial on the merits.

Plaintiff, Biswanath Halder, a resident alien from India, alleged discrimination based on national origin because defendant, Avis, failed to hire him on four separate occasions. After all motions to amend his complaint and to compel discovery were decided and the denial of a preliminary injunction appealed and affirmed, the court ordered the case to be tried. Plaintiff refused to proceed, whereupon the court deemed that a prima facie case had been made out and instructed defendant to proceed with its defense. Defendant called its witnesses and plaintiff fully exercised his right

to cross examination of the witnesses, but could elicit no facts showing that discriminatory criteria were used to determine that plaintiff was not qualified for a position with defendant. The court found that defendant had rebutted plaintiff's prima facie case by showing that plaintiff was not qualified for employement as a computer programmer/analyst with defendant Avis and that no discriminatory criteria were used in such determination.

Questions Presented

1. Did the court commit error in denying plaintiff's subsequent motions to amend his complaint.

2. Did the court commit error in denying in part plaintiff's motions to compel discovery.

3. Whether the District Court was correct in awarding attorney's fees of $500.00.

4. Whether the decision of the District Court dismissing the complaint with costs after a non-jury trial on the merits was supported by the evidence.

5. Should the District Court have dismissed the complaint.

Statement of the Case

Plaintiff, Biswanath Halder, commenced this action alleging employment discrimination in violation of 42 USC §2000e et seq. based on national origin.

A. Factual Background

The amended complaint alleges that plaintiff is a resident alien who received a Bachelor's Degree in Electrical Engineering from the University of Calcutta, obtained two years training in computer software with two companies in England, was admitted to this country in 1969 and has been unable to secure a single job or job offer since July, 1970.

The discriminatory acts complained of involve the refusal by defendant, Avis, to hire plaintiff in that: On July 20, 1970 and February 14, 1971 he made application for employment and received no responses; on December 5, 1973 he made application for employment and on December 13, 1973 was rejected; and on January 13, 1974 he made application for employment and on February 5, 1974 was rejected.

B. Prior Proceedings

In view of the award of attorney's fees to defendant, it is necessary to outline for the court in some detail the prior proceedings in this case.

On May 10, 1971, plaintiff filed an unsworn charge of discrimination based upon national origin against defendant with the Equal Employment Opportunities Commission (EEOC). Pursuant to statute, 42 USC §2000e-5(c) and (d), action by the EEOC was deferred pending referral to the New York State Division of Human Rights, which, on July 23, 1971, requested plaintiff to contact them. Plaintiff failed to do so.

On December 5, 1972, plaintiff swore to the EEOC charge and after investigation, the EEOC, on February 2, 1973, rendered its determination of no reasonable cause notifying both plaintiff and defendant of its decision.

On July 22, 1974, plaintiff requested a right-to-sue notice and on September 4, 1974, the EEOC sent him the notice.

On November 7, 1974, this action was commenced and issue was joined by filing of defendant's answer denying all charges. A motion to amend the complaint to enumerate the four separate occasions when plaintiff's applications for employment were rejected was made (D 5)* and over opposition granted by Memorandum Decision and Order dated February 25, 1975, Mishler, C.J. (D 9). An answer to the amended complaint denying all charges was filed.

There then followed a series of motions and cross motions by plaintiff as follows:

a) A second motion by plaintiff to amend the complaint to add a cause of action under 42 USC §1981, an additional date of discrimination (May 16, 1975), and additional grounds of discrimination (color, religion and alienage) was made (D 17).

b) Interrogatories were served on defendant and answered in part and objected to in part. A motion to compel defendant to answer the interrogatories was made and granted to the extent of compelling answers to

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* In order to avoid confusion, the same method of referring to the record used by plaintiff Halder will be used herein: Reference to the record will be made by Document number on the docket sheet and where appropriate by page, e.g. D 19, p 2.

some interrogatores and in all other respects denied by Memorandum Decision and Order dated June 13, 1975 (D 18). A motion to reargue the motion to compel answers to the interrogatories was made by plaintiff (D 19).

c) Defendant moved to dismiss the complaint or for judgment on the pleadings (D 24). A cross motion for an order for leave to amend the complaint, for reargument of plaintiff's motion to compel answers to interrogatories and for summary judgment was made by plaintiff (D 26 and 27).

d) A motion for a preliminary injunction enjoining defendant from denying employment to plaintiff was made (D 30).

Each of the foregoing motions was opposed and by Memorandum Decision and Order dated January 22, 1976, each motion was denied.

A notice of appeal from the denial of the preliminary injunction was filed, an appeal taken and the denial of the preliminary injunction was affirmed (Halder v. Avis Rent-a-Car System, Inc., 541 F.2d 130 (Docket #76-7039).

A request to produce documents was served on defendant and answered to the extent of refusing to produce the documents because the request was identical to or more extensive than the requests contained in the interrogatories. A motion for an order compelling production was made by plaintiff (D 43), opposed and by Memorandum Decision and Order dated September 13, 1976 was denied (D 48). Prior to that decision, plaintiff served supplemental interrogatories on defendant which defendant answered in full.

On September 15, 1976, this case was called for trial before Hon. Jacob Mishler, Chief Judge of the District Court, Eastern District of New York. Defendant was ready for trial. Upon plaintiff's refusal to proceed, defendant moved to dismiss. This motion was denied, the court deeming that plaintiff had made out a prima facie case (D 55, pp 7-8). Defendant proceeded to call its witnesses, plaintiff exercising his right to cross examination. The court then found that the claim under 42 USC §2000e was totally without merit and malicious in that there was no basis in fact for the claim (D 55, p 30).

Summary of Argument

1. The denials of plaintiff's subsequent motions to amend his complaint were correct.

2. The denials of plaintiff's motions to compel discovery were correct and even if error, were harmless error in view of the fact that the court deemed that plaintiff had proven a prima facie case which plaintiff may not have been able to do even if unlimited discoverey had been allowed, thus no prejudice requiring reversal resulted to plaintiff.

3. The nominal attorney's fees awarded was under the facts of this case a proper exercise of discretion by the trial court.

4. The decision of the court below dismissing plaintiff's complaint on the merits was correct and fully supported by the evidence adduced at the trial, which plaintiff was not able to rebut even though he exercised his opportunity to cross examine the witnesses.

5. The District Court should have dismissed the complaint as not timely commenced pursuant to 42 USC §2000e-5(e) and (f)(1).

POINT I

THE DENIALS OF PLAINTIFF'S SUBSEQUENT MOTIONS TO AMEND HIS COMPLAINT WERE CORRECT

Plaintiff's first motion to amend his complaint was granted. In his second motion to amend his complaint (D 17), plaintiff sought to add (A) a cause of action under 42 USC §1981, (B) a new date of discrimination, May 16, 1975, and (C) discrimination based upon color, religion and alienage. In his third motion to amend his complaint contained in the cross-motion for summary judgment (D 26 and 27), plaintiff again sought to add a cause of action under 42 USC §1981, a new date of discrimination, May 16, 1975, adding that a rejection was received on June 30, 1975 and discrimination based upon color, religion and alienage adding in the factual statement that "plaintiff was born in India, of Indian parentage; my color is brown; and my religion is Hinduism." The relief requested was expanded to include a request for a declaratory judgment and issuance of a preliminary and permanent injunction. Other language changes in the complaint were

minor and immaterial.

A. Claim under 42 USC §1981

As to the claim under 42 USC §1981, the case of Gradillas v. Hughes Aircraft Co., 407 F. Supp. 865, is almost exactly on point. There the court stated:

> "It has been uniformly held that matters of racial discrimination are the only matters which are encompassed within 42 United States Code, Section 1981. Agnew v. City of Compton, 239 F.2d 236 (9th Cir. 1957); Arnold v. Tiffany, 359 F.Supp. 1034 (C.D.Cal 1973), affirmed 9 Cir., 487 F.2d 216, cert. denied, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881.
>
> * * *
>
> "The plaintiff's allegations in the instant matter being based solely on a claim for discrimination based on national origin are not within the confines or scope of 42 United States Code, Section 1981, and therefore, this Court has no jurisdiction to consider any claims thereunder."

Plaintiff has consistently alleged only discrimination based on national origin and has carefully avoided alleging discrimination based on race as can be seen by his omission of the word as one of the additional grounds of discrimination and by his motion

to correct the Memorandum Decision and Order dated August 26, 1976 to delete the reference to race.*

The Court's attention is directed to the footnote of Judge Mishler in the Memorandum Decision and Order dated January 22, 1976 (D 35, p 2) to the effect that:

> "In another action, this court denied a request by plaintiff to amend his complaint to include a cause of action under 42 U.S.C. §1981 because §1981 does not give redress to discrimination because of national origin. Halder v. RCA Corp., 74-C-13975 (E.D.N.Y. April 25, 1975). Since that decision plaintiff's requests to amend his various complaints have all added discrimination because of color, religion and alienage to support his §1981 action."

But, since plaintiff still does not allege discrimination based on race, the Court below was correct in denying the amendment to include a claim under §1981.

B. New Date of Discrimination

The Court below properly denied amendments of the complaint to add the new date of discrimination of May 16, 1975 and the rejection on June 30, 1975. No charge was filed with the EEOC as to these dates and thus the court does not have jurisdiction over these

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* It is noted that this motion is not contained in the record on appeal. A copy is annexed as Appendix A to this brief.

acts for 42 USC §2000e-5(e) provides that:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . ."

See also Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231 and Molybdenum Corp. of America v. EEOC, 457 F.2d 935, 936.

This new application and rejection cannot be considered a continuing act of discrimination since the original EEOC charge had been terminated in February, 1973.

On the Olson case, supra, where the employee had been terminated from her employment, the court stated, at page 1234, that:

> "As we noted in Richard, to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, cf. Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), even though on layoff, Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Sciaffra v. Oxford Paper Co., 310 F.Supp. 891 (D. Me. 1970), we do not think this theory has validity when asserted by a former employee. For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date."

See also Willis v. Chicago Extruded Metals Company, 375 F.Supp. 362, and cases cited therein, where the court indicated, at pps. 364-5, that the acts must have occurred during the pendency of the charge before the EEOC.

Any other decision would be totally contrary to the intent of the statute and unduly burden the judicial system, for all a plaintiff would then need do would be continually to reapply for a position, be rejected, and move to amend his complaint.

C. Discrimination Based Upon Color, Religion and Alienage

As to the additional grounds of discrimination based on color, religion and alienage, there is no provision under 42 USC §2000e for a claim of discrimination based on "alienage". If covered, it is covered under the term "national origin" which would not require an amendment to the complaint. Furthermore, it is not illegal to discriminate on the basis of alienage. Espinoza v. Farah Mfg. Co., 414 US 86,95, 38 L Ed 2d 287, 94 S Ct 334. As to the claims of discrimination based on color and religion, not only does the complaint fail to

allege any specific acts of discrimination based on color or religion to support even an inference of such discrimination, Abiodun v. Martin Oil Service, Inc., 475 F.2d 142, 145, but it mentions for the first time plaintiff's color and religion, which was previously unknown.

The original complaint filed contained no reference to plaintiff's color or religion and did not allege any act of discrimination based on these grounds; the gravamen of the complaint was exclusively national origin. Campbell v. A. C. Petersen Farms, Incorporated, 69 F.R.D. 457, 461.

In addition, as stated in Campbell, supra:

> "It is clear that this issue was not raised within 90 days of plaintiff's receipt of his right to sue notice from the EEOC as is required by the statute. [42 USC §2000e-5(f)(1) (Supp.II, 1972).]"
>
> * * *
>
> "Therefore this new allegation cannot be deemed to arise out of the 'conduct. . . set forth in the original pleading' and cannot be held to relate back to the date of filing of the original complaint. Rule 15 (c), Fed. R. Civ. P."

Thus the amendment was untimely and properly denied by the court below.

POINT II

THE DENIALS OF PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY WERE CORRECT AND, IF ERROR, WERE HARMLESS ERROR IN VIEW OF THE FACT THAT THE COURT BELOW DEEMED THAT PLAINTIFF HAD PROVEN A PRIMA FACIE CASE

Although liberal discovery is allowed under the applicable Federal statutes, discovery should be limited to relevant information so as to allow the parties to develop fully and to crystallize and narrow concise factual issues for trial. Burns v. Thiokol Chemical Corporation, 483 F.2d 300.

Plaintiff's interrogatories and demand for production of documents were not limited to his claim of national origin discrimination nor were they limited as to the dates when the discrimination allegedly occurred.

The court below was fully familiar with each and every interrogatory and request for production as well as the issues which were developed throughout the many motions. It was clear to the court below that

plaintiff's requests were so broad and unspecific that defendant would be forced to engage in extensive research and compilation, resulting only in the preparation of plaintiff's case for him. See Memorandum Decisions and Orders dated June 13, 1975 and January 22, 1976 (D 18 and 35). This the defendant need not do. Fischler & Porter Co. v. Sheffield Corp., 31 F.R.D. 534, 537-8.

It was further clear that even if plaintiff had been allowed unfettered discovery, this would be of no aid to him for the issue was his own qualifications and interrogatories requesting employment criteria had been answered (D 11).

In addition, in determining whether to grant the discovery requested, the court should balance the burden which would be placed on defendant in answering the demands against the value plaintiff would receive from the answers, including the probative value this information would have on his case. DaSilva v. Moore-McCormick Lines, Inc., 47 F.R.D. 564. This the court below did and found that plaintiff's demands were burdensome (D 18 and 35).

Since discovery matters are committed almost exclusively to the sound discretion of the trial judge, it is only where such decisions impede the full vindication of guaranteed rights that there must be a reversal. Burns v. Thiokol Chemical Corporation, supra, 304-5.

As the issues developed and crystallized prior to trial, it was clear that the requests of plaintiff were irrelevant and those that were relevant had been answered.

The trial court fully protected plaintiff from prejudice by deeming that plaintiff had made out a prima facie case (D 55, p 7), thus putting plaintiff in the position (or better than) he would have been had he had unfettered disclosure. This relieved the plaintiff of his burden to prove his case and shifted the burden to defendant.

From all the facts and circumstances herein, it is clear that the court below exercised its discretion in such a way as to prevent prejudicial surprise, conserve precious judicial energies and give full vindication to guaranteed rights.

Thus, either no error was committed or, if error there was, it was harmless.

POINT III

THE NOMINAL ATTORNEY'S FEE AWARDED WAS UNDER THE FACTS OF THIS CASE A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT

42 USC §2000e-5(k) provides:

> "In any action or proceeding under this sub-chapter the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee as part of the costs. . ."

Defendant's witnesses at the trial testified that over §4,000 in attorneys' fees had been incurred and actually paid by defendant in the defense of this action (D 55, pp 29030).

Throughout this action and even in his brief to this court, plaintiff has constantly accused defendant of unlawful conduct because it defended the action, (plaintiff's brief pp 1, 24, 28, 31). Yet plaintiff, using the identical set of facts, has sued approximately nine different companies alleging nothing more than that they failed to hire him without even showing that he was qualified for the positions for which he applied.

He has subjected defendant to three motions to amend his complaint, demands for interrogatories and production of documents and motions to reargue the denials, a motion for a preliminary injunction and an appeal, trial, and now a further appeal.

While the Supreme Court's rationale of a "private attorney general", Newman v. Piggie Park Enterprises, Inc., 390 US 400, 19 L Ed 2d 1263, 88 S Ct 964, cannot be applied to a prevailing defendant, the court, in its discretion, is entitled under the statute to award attorney's fees to prevailing defendants when a frivolous or factually baseless action has been brought. Carrion v. Yeshiva University, 535 F.2d 722; Lee v. Chesapeake & Ohio RR Co., 389 F.Supp. 84; Matyi v. Beer Bottlers Union, 392 F.Supp. 60.

The court below found that plaintiff's claim was groundless and malicious, which finding was clearly substantiated by the records and proceedings before the court.

In such case, the award of attorney's fees to defendant is clearly justified under the statute

and was not error.

The award of only $500 in this situation was an award of nominal attorney's fees (D 55, pp 30-31) and does not reflect in any manner the amount of time reasonably necessary for the defense of this case. Evans v. Sheraton Park Hotel, 503 F.2d 177.

POINT IV

THE DISMISSAL OF THE COMPLAINT ON THE MERITS IS FULLY SUPPORTED BY THE EVIDENCE

The opposing factual contentions at trial were as follows:

Plaintiff claimed he was not hired by defendant because of his national origin;

Defendant claimed it did not hire plaintiff because he was not qualified.

Plaintiff has the initial burden of establishing a prima facie case of national origin discrimination McDonnell Douglas Corp. v. Green, 411 US 792, 802, 36 L Ed 2d 668, 93 S Ct 1817. By not granting defendant's motion to dismiss, the trial court deemed a prima facie

case had been proven by plaintiff (D 55, pp 7-8). Thus, the burden shifted to defendant to show some legitimate, non-discriminatory reason for the refusal to hire plaintiff.

Defendant showed that its refusal to hire plaintiff was based on his lack of the qualifications required by defendant.

Defendant's witness, Peter Smith, testified on direct and cross examination:- that for its accounting computer system, defendant required a minimum of two years experience in COBAL programming, a computer language in which plaintiff's resume showed no experience (D 55, p 12); that defendant's Wizard Real Time system, described as a large-scale system, is comprised of an IBM 360/65 processor, an IBM 360/60 processor and another IBM 360/65 processor (D 55, p 11); that defendant recurits programmers to work on the 360 Wizard system who have a minimum of two years experience in IBM 360 basic machine language or Basic Assembly Language (BAL) (D 55, p 16); that plaintiff's resume showed a total experience in the computer area of 26 months at four jobs, two in England, one in New York and one in New Jersey (D 55, p 13); that for six

months plaintiff wrote one program on an IBM 360/30 computer which is not considered a large-scale computer (D 55, p 15); and that all plaintiff's resume lists is assembly language or machine language of the machine used (D 55, p 16).

The testimony further showed that defendant has consistently insisted on the requirements of two years experience (D 55, pp 12, 16, 17). Plaintiff was given full opportunity to cross-examine all witnesses.

From the testimony, it is clear that plaintiff, if he applied, would not be qualified to work on defendant's accounting computer system for he has no experience in COBAL language.

Neither would he be qualified, if he applied, to work on defendant's Wizard Real Time system, for his only experience in IBM 360 basic machine language or Basic Assembly Language (BAL) consisted of participating for 6 months in the writing of one program for an IBM 360/30 computer. All plaintiff's further experience consisted of specific machine language for machines not used by defendant.

The selection procedure used by defendant was fair and nothing in it precluded consideration of anyone because of his national origin and there was shown no specific design to deprive plaintiff of any job opportunity. Morrow v. Crosby, 413 F.Supp. 933.

The reasons given above for failure to hire plaintiff clearly rebut plaintiff's prima facie case. The burden thus moved back to plaintiff to show national origin discrimination or at least that defendant's experience requirement was a pretext for national origin discrimination.

Plaintiff made no attempt whatsoever to rebut defendant's testimony. He offered no proof of his qualifications although the opportunity to do so was given to him.

The traditional standard of review of the District Court's action is whether the factual findings of the District Court were clearly erroneous. Langnes v. Green, 282 US 531, 541, 75 L Ed 520, 51 S Ct 243.

The District Court found that defendant had rebutted plaintiff's prima facie case, that plaintiff

had failed to make any showing whatsoever of any discriminatory practices on the part of defendant and that plaintiff's claim was totally without merit and malicious in that it had no basis in fact (D 55, p 30).

On the record in this case there is no basis for this court to hold that these factual findings are clearly erroneous. The District Court's conclusion that defendant sustained its burden and that defendant has not discriminated against plaintiff because of his national origin should, therefore, be affirmed.

POINT V

THE COMPLAINT SHOULD HAVE BEEN DISMISSED BECAUSE THE ACTION WAS NOT TIMELY WITHIN THE LIMITS OF 42 USC §2000e-5(e) and (f)(1)

In his amended complaint, plaintiff states four dates of alleged discrimination: July 20, 1970, February 14, 1971, December 5, 1973 and January 13, 1974.

42 USC §2000e-5(e) provides that a charge of discrimination shall be filed with the EEOC within 180 days (6 months) after the alleged discrimination occurred.

It has consistently been held that it is a jurisdictional prerequisite to the filing of a Title VII suit that a charge of discrimination be timely filed with the EEOC. Williams v. General Foods Corp., 492 F.2d 399, 404 and Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231.

As to the July 20, 1970 date, not only was no charge filed with the EEOC, but also, when plaintiff did file with the EEOC on May 10, 1971, a charge of discrimination for July 20, 1970 would have been and was untimely as over 9 months after the alleged discrimination occurred. Thus the court was without jurisdiction as to this date.

The court was also without jurisdiction as to the December 5, 1973 and January 13, 1974 dates because again no charge was filed with the EEOC. In addition, the EEOC had terminated its proceedings on February 2, 1973. These dates of alleged discrimination cannot be considered continuing violations for not only did they not occur while the EEOC charge was pending, but they would also have to be considered as totally new derelictions. Willis v. Chicago Extruded Metals Company, supra.

and Olson v. Rembrandt Printing Co., supra.

Thus, for the same reasons previously stated in this brief, Point I-B, pp 12, 13 and 14, regarding the date of May 16, 1975, the court was without jurisdiction as to these dates.

As to the February 14, 1971 date, although the charge was timely filed with the EEOC pursuant to 42 USC §2000e-5(e), an action was not timely commenced pursuant to 42 USC §2000e-5(f)(1).

42 USC §2000e-5(f)(1) provides that if an EEOC charge is dismissed within 90 days after giving notice of such dismissal, a civil action may be brought. This time limit is also a jurisdictional requirement Archuleta v. Duffy's, Inc. 471 F.2d 33.

The EEOC issued its determination of no reasonable cause dismissing the charge on February 2, 1973. On July 22, 1974, over one year and 5 months later, plaintiff requested a Notice of Right to Sue which was issued on September 4, 1974 (D 24, Exhibits C & D). This action was commenced on November 7, 1974. No reason for this delay has ever been given by plaintiff although the reason can be presumed from the plaintiff's other cases.

Regardless of the exact language of the "Explanation of Judicial Review" sent to plaintiff along with the determination (D 24, Exhibit B), see DeMatteis v. Eastman Kodak Company, 511 F.2d 306 modified 520 F.2d 409, plaintiff so delayed any action on his claim that the principal of laches should be applied in this case.

In addition, it is clear from the legislative history and the amendment to the time limitation, that a short statute of limitations was a deliberate, considered and intended act of Congress. It is also clear that the need for preventing stale claims and unfair surprise is great in Title VII claims. Smith v. Perkin-Elmer Corporation, 373 F.Supp.930, 936.

Where, as here, all plaintiff has claimed is that he sent a resume by mail to defendant and received no response, the need for a short time limitation is strikingly obvious. Not only does defendant have no record of plaintiff requesting employment on February 14, 1971, but it also does not keep resumes for more than one year. Further, defendant would have no reason to keep any material presented in the EEOC proceeding for more than the statutory time within which plaintiff

must commence a civil suit. The delay by plaintiff and the error of the EEOC has substantially prejudiced the defendant because of the lack of records necessary to defend this action. DeMatteis v. Eastman Kodak Company, supra.

Thus, for the reasons stated above, the court was without jurisdiction and the complaint should have been dismissed.

CONCLUSION

The judgment appealed from is fair and correct and should be affirmed or in the alternative the complaint should be dismissed.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND JUDICIAL CIRCUIT

VISVANATH HALDER, Plaintiff Appellant. - against -	DOCKET NO. 76 7039
AVIS RENT-A-CAR SYSTEM, INC., Defendant - Appellee.	MOTION

TO :

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THE PLAINTIFF APPELLANT MOVES THE COURT FOR CORRECTION OF THE DECISION OF AUGUST 20. 1976, TO ACCURATELY REFLECT THE PLEADINGS. IN HIS ORIGINAL AND AMENDED COMPLAINTS THE PLAINTIFF-APPELLANT ALLEGED DISCRIMINATION ON GROUNDS OF NATIONAL ORIGIN, AND SUBSEQUENTLY HE MOVED TO AMEND THE COMPLAINT TO ADD COLOR RELIGION, AND ALIENAGE AS GROUNDS OF DISCRIMINATION (WHICH WAS DENIED BY THE DISTRICT COURT ON JANUARY 22. 1976). HE NEVER

ALLEGED DISCRIMINATION ON RACIAL GROUND.

THE CORRECTED DECISION SHOULD READ AS FOLLOWS:

IN THIS ACTION BY BISWANATH HALDER . . . ALLEGING THAT THE DEFENDANT-APPELLEE, AVIS RENT-A-CAR SYSTEM, INC. . . . REFUSED TO HIRE HIM AS A COMPUTER PROGRAMMER BECAUSE OF HIS ~~RACE~~ ~~AGE~~ NATIONAL ORIGIN, HALDER APPEALS FROM A MEMORANDUM [OF] DECISION AND ORDER OF CHIEF JUDGE JACOB MISHLER . . . DENYING HALDER'S APPLICATION . . . FOR A PRELIMINARY INJUNCTION WHICH WOULD DIRECT AVIS . . . TO HIRE HIM PENDING OUTCOME OF THE LITIGATION.

ALSO THE ADDRESS SHOULD BE CORRECTED. THE ADDRESS OF THE PLAINTIFF-APPELLANT IS 173-17 65 AVENUE, FRESH MEADOWS, NEW YORK 11365

Yours, etc.

Biswanath Halder
Plaintiff Pro Se

DATED: Queens, New York
September 5, 1976

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

ALICE L. BERUBE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Mineola, New York.

That on the 28th day of February , 19 77 deponent served the within Brief on Behalf of Defendant-Appellee, Avis Rent-A-car System, Inc., upon the following attorneys in this action,

Biswanath Halder,
Plaintiff-Appellant
173-17 65th Avenue
Fresh Meadows, New York 11305

being the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, located at the corner of Main Street Street and First Avenue, Mineola, New York 11501 at 5:00 p.m.

Alice L. Berube

Alice L. Berube

Sworn to before me this

28th day of February , 19 77

M. Kathryn Meng

M. KATHRYN MENG
NOTARY PUBLIC, State of New York
No. 30-7896800
Qualified in Nassau County
Commission Expires March 30, 1978